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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN AND VICTOR L. GREEN, *Appellants*,
v.
NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,
Appellees.

On Appeal From the United States District Court for the Southern District of New York

BRIEF AMICI CURIAE FOR NATIONAL ASSOCIATION OF LETTER CARRIERS (AFL-CIO) AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO)

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June 14, 1973

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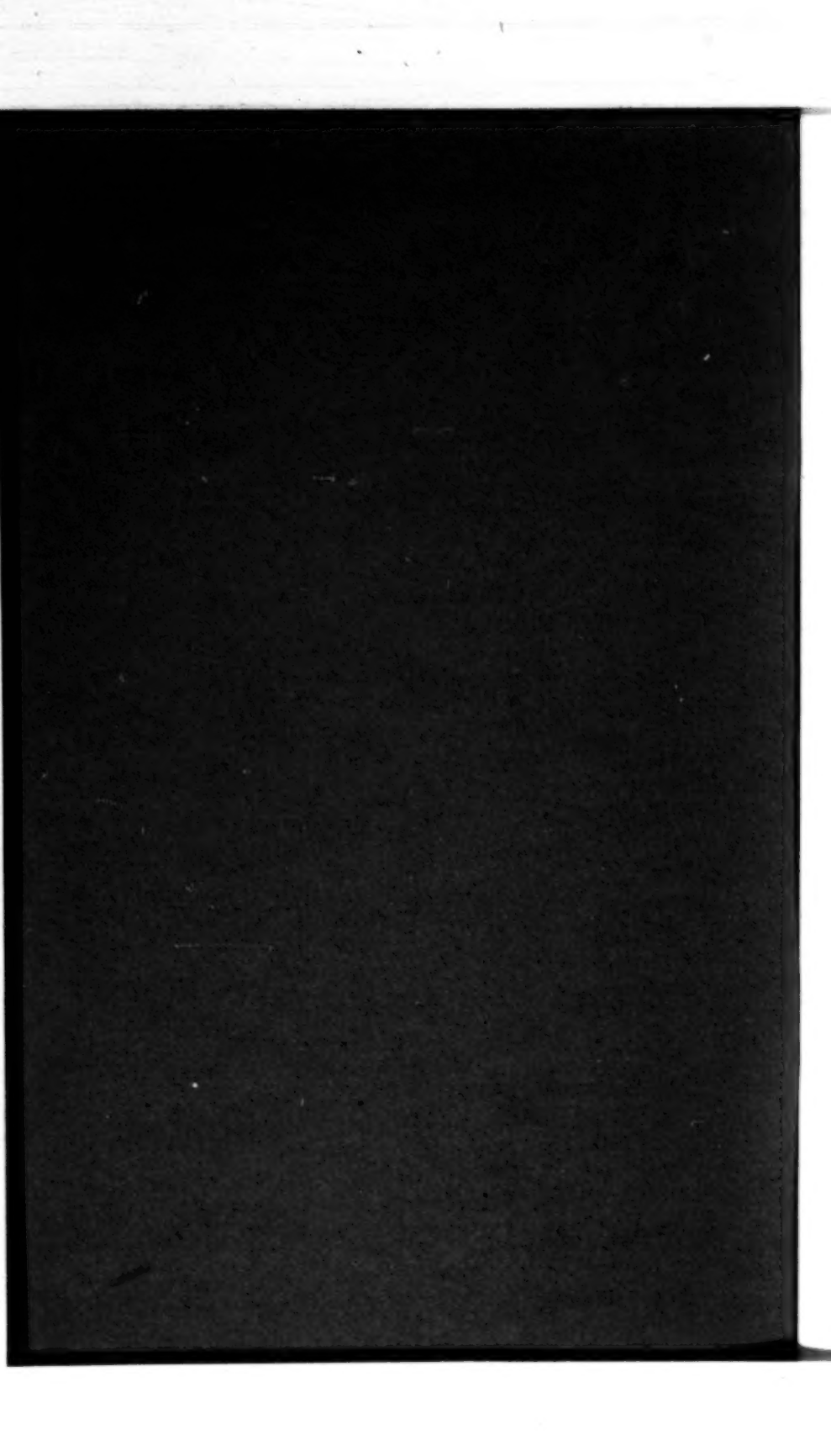

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INTEREST OF THE AMICI

The National Association of Letter Carriers, AFL-CIO ("NALC") is an unincorporated association and labor union with approximately 220,000 members. It is the exclusive bargaining representative of 202,000 city letter carriers of the United States Postal Service, an independent establishment of the Executive branch of the government of the United States. These city

letter carriers include both permanent and probationary employees.

The American Federation of Government Employees, AFL-CIO ("AFGE") is an unincorporated association and labor union with approximately 325,000 members, who are civilian permanent and probationary employees of the Federal and District of Columbia Governments. AFGE is the largest labor organization of non-postal federal employees, and is the exclusive representative of approximately 650,000 civilian government employees, including so-called blue collar, white collar, and professional classes of employees dispersed through every major department and agency of the Federal Government.

In their capacities as exclusive bargaining representatives the amici deal with management of the Postal Service and other government agencies on grievances, personnel policies and other matters affecting working conditions of the employees they represent, including probationary employees. They are therefore keenly interested in the rights of federal probationary employees to receive unemployment compensation benefits to which they are entitled, and fair procedures for ascertaining their entitlement.

ARGUMENT

Federal Probationary Employees Are Entitled by Statute to a Hearing on the Reasons for Their Termination If Those Reasons Are Asserted as the Basis for Denying Their Eligibility for Unemployment Compensation.

The question in this case is whether federal probationary employees may lawfully be denied eligibility for unemployment compensation benefits absent a fair hearing with respect to the reasons for the termination of their federal employment, where those reasons are

the basis for denying eligibility. The court below by a divided vote decided that question in the affirmative, rejecting plaintiffs' claims that some form of hearing is required both by the applicable statutes and the Fifth Amendment to the United States Constitution. We submit, in accord with the dissent below (A. 71-78) and the decision of the Court of Appeals for the District of Columbia in *Smith* v. *District Unemployment Compensation Board,* 435 F.2d 433 (hereafter sometimes referred to as "*Smith*"), that the result reached below is contrary to the statutory scheme. Accordingly, the constitutional issue need not be reached, compare, e.g., *California Department of Human Resources* v. *Java,* 402 U.S. 121 124.[1]

1. A brief description of the statutory scheme is a necessary predicate to our discussion. The Social Security Act of 1935, 49 Stat. 626, 42 U.S.C. §§ 501 *et seq.*, created the unemployment compensation system. The background and purpose of the unemployment compensation program is fully described in *Java* (402 U.S. at 129-133), and need not be repeated here. Originally, federal employees were expressly excluded from coverage. However, in 1954 Congress amended the Social Security Act to extend unemployment compensation to substantially all civilian employees;[2] as the Court of Appeals said in *Smith:*

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[1] In limiting our discussion to the statutory issue we do not intend to imply disagreement with appellants' constitutional contentions. On the contrary, as we develop below, these are so substantial that they fortify the statutory interpretation which we urge.

[2] These amendments were embodied in Title XV of the Social Security Act of 1954, §§ 1501 *et seq.*, 68 Stat. 1130 *et seq.* With certain technical amendments adopted in 1958, 1960, 1966 and 1967 these provisions are now codified as 5 U.S.C. §§ 8501-8508.

> "Congress was keenly aware that Federal employees face risks of unemployment, since there had been a substantial drop in Federal employment between June 1952 and 1954, just as there had been a drop beginning in 1945 following the peak of World War II." 435 F.2d at 436.

See also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer). In thus eliminating "the discrimination that has been practiced by the Federal Government against its Federal civilian employees" and assuring "all of our citizens that they will be equally covered should they be so unfortunate as to become unemployed,"[3] Congress did not distinguish between permanent and probationary employees.[4]

The present controversy centers around the procedures for determining eligibility for unemployment compensation benefits. Two alternative procedures are established. The first provides for administration of unemployment compensation to Federal employees by the States, pursuant to agreements reached with the Secretary of Labor. Under this provision, 5 U.S.C. § 8502, the State must agree that compensation to a Federal employee will be paid by the State "on the same terms, and subject to the same conditions as the compensation which would be available to him under the unemployment compensation law of the State if his Federal service and Federal wages * * * had been included as employment and wages under that state law." 5 U.S.C. § 8502(b). 5 U.S.C. § 8502(d) provides for

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[3] 100 Cong. Rec. 10079 (1954) (remarks of Rep. Springer).

[4] This proposition is not disputed. See S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 7 (1954).

review of the State agency's determination in the same manner and to the same extent as review is provided under the State unemployment compensation law. The alternative procedure, embodied in 5 U.S.C. § 8503, which is operative in the absence of an agreement with the State to which the Federal employee's Federal service and Federal wages are assigned (as determined by 5 U.S.C. § 8504), vests responsibility for administering benefits in the Secretary of Labor. Under both procedures the employee is entitled to a hearing on his eligibility. If § 8502 applies, the State procedures are governed by 42 U.S.C. § 503(a)(3) which, tracing back to § 303 of the 1935 Act, requires the States to provide "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." And if § 8503 applies, the first sentence of subsection (c) provides that the employee "is entitled to a fair hearing under regulations prescribed by the Secretary."

The provision which was held by the majority below to authorize denial of eligibility without a hearing on the reasons for the employee's termination, is 5 U.S.C. § 8506(a). This provides that the Federal employing agency shall make available to the State agency (or the Secretary of Labor, as the case may be) information concerning the employee's Federal service and wages, and specifically its findings concerning "the reasons for termination of Federal service." It further provides:

> "The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in ac-

cordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c)."

2. In *Smith* v. *District Unemployment Compensation Board,* 435 F.2d 433 (C.A.D.C.), the Court concluded that

> "it was the contemplation of Congress that no finding by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing before an impartial tribunal." *Id.* at 438.[5]

[5] The plaintiff in *Smith* was a permanent employee who had resigned, but contended that she had done so under circumstances which did not make her ineligible for unemployment compensation; the employing agency had made a finding that "investigation failed to support allegations of employee" (435 F.2d at 435). Neither the majority nor the dissent in the present case took the view that this difference in circumstances was at all relevant; this was clearly sound, since there was nothing in the *Smith* opinion which distinguishes the situations of the permanent employee who resigns (and has no hearing on his termination for that reason) and the probationary employee who is separated by the agency. Accordingly, the Court of Appeals stated that *Smith*

> "involves an issue of the procedure required where a person seeking unemployment compensation payable under state law (here, the law of the District of Columbia), following the termination of Federal employment, finds compensation denied or curtailed because of findings of the employing (Federal) agency made in the absence of a hearing." *Id.* at 434.

Nevertheless, under the present state of the law the applicable regulations do distinguish between the right to a hearing of employees who resign, and those who are terminated. 20 C.F.R. § 609.18(a) now provides:

> "Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the

In this case, however, the majority of the District Court expressly "refuse[d] to follow the construction of 5 U.S.C. § 8506 set forth in *Smith*, supra." (A. 66). It said that "the idea that the use of the word 'findings' in 5 U.S.C. § 8506 means 'findings after a hearing' is a tortured, strained and unnecessary interpretation." (A. 67). But to the extent that the language of the Act supports either construction, the better view is that of the dissenting judge below, that the "very word 'findings' buttresses th[e] inference" that some form of hearing is required:

> "If it is not inescapably true, the word commonly refers to resolutions or determinations following deliberations upon evidence in a manner of which the judicial process is the ideal case. See Black's Law Dictionary 758 (4th ed. 1957), citing cases. If the probable image is not always of a full-scale trial 'hearing,' it is certainly not of the simple assertion of a 'fact' or merely 'the conclusory statement of a result' where there has been no opportunity for countervailing presentations and no pretense of considering two sides. *Coleman* v. *Brucker*, 257 F.2d 661, 662-663 (D.C. Cir. 1958); *Sims* v. *Greene*, 161 F.2d 87, 89 (3d Cir. 1947)." (A. 74)

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alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23."

This regulation was evidently a response to the *Smith* case. It was promulgated on July 20, 1971, 36 Fed. Reg. 1130, replacing an earlier version which had read simply:

> "Federal findings under § 609.6 or 609.7 shall be final and conclusive." 20 C.F.R. § 609.18(a), 32 Fed. Reg. 20969 (Dec. 29, 1967).

The *Sims* case, *supra*, is particularly in point, for there Judge Biggs construed the requirement for "findings" in Rule 52(a) of the Federal Rules of Civil Procedure—perhaps the most familiar provision of federal law employing that term—to imply the necessity for a hearing:

> "If anything more was required to indicate with certainty that a preliminary injunction may not issue without giving the party sought to be enjoined an opportunity to present evidence on his behalf, it is furnished by the provisions of Rule 52(a) which requires the court, in all actions 'tried upon the facts without a jury' to state separately its conclusions of law and 'in granting or refusing interlocutory injunctions' 'similarly [to] set forth the findings of fact and conclusions of law which constitute the grounds of its action.' The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence. Finding facts requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both." 161 F.2d at 89.

Thus, whereas the majority below regarded it as "tortured, strained and unnecessary" to infer the right to a hearing from the requirement that findings be made, Judge Biggs in *Sims* regarded the same "conclusion" to be "inescapable."

In short, Judge Frankel was surely right in saying that " 'findings' fits at best crudely the ex parte declaration upon which plaintiffs were dismissed." (A. 75). Indeed, we suggest that he was more generous to the majority's view than consistent with his own when

he conceded that "neatly or not, the word does fit" and that "[i]f textual analysis were the whole of our responsibility, plaintiffs would probably deserve to lose." (*Id.*) In any event, while we think that the language is at the very least indicative of a Congressional understanding that the controlling "findings" should be something more than a mere statement of his reason by the person responsible for the probationary employee's termination, the least that must be granted is that the term cannot be read to *negate* the requirement for a hearing if the other tools of statutory interpretation point to that result.

The majority charged that the *Smith* court had "ignor[ed] the structure of the Federal Civil Service Laws," wherein "Congress has made a distinction between probationary and permanent Government employees" (*id.*). Building on that proposition, the majority reasoned that the 1954 Congress was aware that "[p]robationary employees are not entitled to the full range of hearing rights to which permanent employees are entitled upon dismissal" (*id.*) and that "Congress intended that Federal employers should have an unfettered right to terminate probationary employees up to the time such employees acquire permanent status" (*id.*) That right, the majority feared, would be restricted in its exercise if a hearing were required where unemployment compensation eligibility was at issue:

> "No termination hearing is prescribed or required nor should it be. What *Smith*, *supra*, attempts is to legislate judicially a hearing not now required by statute which would mandate precisely the type of hearing not now required for discharge. Such a hearing, as a practical matter, would limit the

> Government in the discharge of probationary employees to an extent never previously contemplated by the Congress." (A. 66-67).

This argument is compellingly refuted by the dissent:

> "It should be stressed, * * * that nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation. When the majority speaks of what is foreseen 'as a practical matter,' it evidently reflects the concern, exhibited in arguments to us for defendants, that the prospect of a hearing—even though not testing the discharge or capable of doing so—would make supervisors in the employing agencies timorous about discharging probationary people. This is a regrettable position. Insofar as it is accurate, it portrays a regrettable situation. We ought not to be so 'practical' that we fashion legal judgments upon the premise that federal officials commonly fire people upon grounds so tenuous that they would not dare order the firings if they thought someone, somewhere else, without authority to reverse the firings, might so much as air the asserted grounds." (A. 76, n. 7, emphasis in original).

To this we need add only one important point. There is no indication whatsoever that the 1954 Congress shared the District Court's assumptions regarding the practicalities of personnel administration. It is therefore to "legislate judicially" (cf. A. 66) to give those unexpressed administrative considerations priority over the avowed and benign purpose of the 1954 amendments to the Social Security Act—to afford federal employees unemployment compensation on the same terms as those provided for private employees.

We do not suggest that the Civil Service laws should be disregarded; and Judge Leventhal cannot fairly be charged with having done so.[6] But his opinion in *Smith* went further and carefully considered the purpose of the 1954 amendments and their context in prior unemployment compensation law (436 F.2d at 436-438). This analysis was summarized as follows:

> "The intention of the 1954 enactment was to put the Federal employee whose employment was terminated in the same general position as a private employee, both being governed by the same principles of State law as to eligibility for compensation.
>
> Congress assured a fair hearing to Federal employees governed by § 8502 (for their claims are considered by the State agency which is under a general mandate to provide fair hearings for private employees), and to Federal employees governed by § 8503, since § 8503(c) provides: 'A Federal employee whose claim for compensation * * * is denied is entitled to a fair hearing under regulations prescribed by the Secretary.' These provisions must be taken into account in considering the intention of that language of § 8506 which states that the findings of Federal agencies shall be final and conclusive." (*Id.* at 438).

On the other hand, the court below "ignored the structure of" (A. 66) the *unemployment compensation laws,* particularly the right to a hearing on eligibility, which has been part of the unemployment compensation system from the beginning. And while preserving the

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[6] Not only does Judge Leventhal's reasoning take account of Civil Service procedures (435 F.2d at 438), but he took pains to modify the District Court's judgment to allow those procedures to be followed (*id.* at 439).

distinction between permanent and probationary federal employees the court gave no heed to the basic policy of the 1954 amendments to establish equality between federal civilian employees and non-governmental workers. It is this fundamental difference in the methods of the two courts that explains the difference in the results reached. For, in light of that policy, the *Smith* court was clearly correct in concluding that:

> "There is no reasonable basis for supposing that whereas Congress deliberately insisted on opportunity of hearing for employees generally, it deliberately established a no-hearing enclave for a relatively small group of Federal employees. . . ." 435 F.2d at 438.[7]

3. There is an additional reason for construing 5 U.S.C. §8506 as authorizing the use of federal findings to deny eligibility only if those findings are based upon a hearing: that construction would avoid serious doubts that the statutory scheme is consistent with the

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[7] The result which we urge can be readily accomplished by amending the governing regulation, 20 C.F.R. § 609.18, to read as follows:

> "Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation *or the reasons given to the employee for his separation* or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23."

The italicized phrase is all that needs to be added to the present regulation as revised in light of *Smith*. See pp. 6-7, n.5, *supra*.

probationary employees' rights to due process and equal protection of the laws under the Fifth Amendment. It appears from its opinion that the District Court did not

> "remember that, [w]hen the validity of an act of the Congress is drawn in question, and * * * a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *United States* v. *Thirty-seven (37) Photographs*, 402 U.S. 363, 369, following *Crowell* v. *Benson*, 285 U.S. 22, 62.

In any event, the Court's analysis of the constitutional issues is so flawed, that it could not begin to give appropriate weight to those issues in determining the meaning of the statute.

a. In disposing of the equal protection contention the court below "reiterate[d] what we have previously stated, [that] Congress had good reason to differentiate between probationary and permanent employees in trying to promote the efficient disposition of Federal business." (A. 68). But this is merely to carry over to the constitutional context the Court's mistaken approach to the statute. For, the issue herein is not whether a distinction may constitutionally be drawn between probationary and permanent employees in affording a hearing on discharge. It is rather whether that distinction is constitutionally supportable where the issue to be resolved at the hearing is eligibility for unemployment compensation benefits.

We assume for purposes of this argument that the Constitution does not require probationary and per-

manent employees to be given the same hearing rights on the reasons for their discharge; the difference in their status relates precisely to their job security. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564; *Perry* v. *Sindermann*, 408 U.S. 593. But here the hearing is sought to protect rights to unemployment compensation, as to which the difference in status is irrelevant in principle as well as in the contemplation of Congress.

As this Court recently said in *Reed* v. *Reed*, 404 U.S. 71:

> "The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)." 404 U.S. at 75-76.

Thus, the District Court's attempted justification of the classification between probationary and permanent employees is, for present purposes, constitutionally untenable. And even if the involvement of the states in this case were deemed insufficient to bring the Fourteenth Amendment into play—a theory not invoked by the District Court—there would be at least a substantial question whether the discrimination is "so unjustifiable as to be violative of due process" and thus forbidden by the Due Process clause of the Fifth Amendment. See *Shapiro* v. *Thompson*, 394 U.S. 618, 641; *Schneider* v. *Rusk*, 377 U.S. 163, 168.

b. With respect to the due process issue the analysis of the court below also suffers from a fundamental flaw. The Court regarded the case as if it were controlled by its decision in *Torres* v. *New York Department of Labor*, 321 F. Supp. 432 (S.D.N.Y.), vacated and remanded, 402 U. S. 968 (1971), previous decision adhered to, 333 F. Supp. 341 (S.D.N.Y.), affirmed 405 U.S. 949, rehearing denied, 410 U.S.—:

> "In the case at bar plaintiffs have not received benefits but have only applied for them. In fact, a three-judge panel of this Court has held that the suspension or termination without a prior hearing of *unemployment compensation benefits* already being paid *without a prior hearing* is not violative of the Fourteenth Amendment. [Citing *Torres*] That Court pointed out that the 'brutal need' of the welfare recipients in *Goldberg* [v. *Kelly*, 397 U.S. 254] was not present in circumstances involving recipients of unemployment compensation. The same Government interest in the efficient operation of the unemployment compensation program which was present in *Torres*, is present here. On balance, the interests of the Government outweigh plaintiffs' need for a hearing and so the due process claim cannot be sustained." (A. 69-70, emphasis in original).

But the issue here is not whether unemployment compensation benefits may be denied or withdrawn *"without a prior hearing"* (A. 70, emphasis in original), as in *Torres* and *Indiana Employment Division* v. *Burney*, 409 U.S. 540; it is whether these may be finally denied without any form of hearing *at any time* on an issue which "the statutory scheme makes * * * an important factor in the State's determination" of eligibility, *Bell* v. *Burson*, 402 U.S. 535, 541. That these are different problems was explicitly pointed out in

Lindsey v. *Normet*, 405 U.S. 56, 66-67, and *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82. It is, we submit, beyond debate.

The claimant's right to a hearing at some time was not questioned either in *Goldberg* or in *Torres* and *Burney*. Thus, even if "unemployment compensation benefits are not of the same urgent nature to the survival of the claimant as are welfare benefits" (A. 69), this is not pertinent here; the urgency of the claimant's need was relied on in *Goldberg* to establish a right to a hearing at a particular time—before withdrawal of benefits. But once the existence of a property interest is established, due process requires a hearing in some form at some time except in the most extraordinary situations, not remotely present here. See e.g., *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571; *Perry* v. *Sindermann*, 408 U.S. 593, 599-603; *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886.[8] And the existence of a property right to unemployment compensation benefits is established. For, it is "a contractual right". *California Department of Human Resources Development Co.* v. *Java*, 402 U.S. 121, 131, quoting Report of the Committee on Economic Security, Hearings on S. 1131 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1321-1322 (1935).

We referred at the outset of this section to the principle that federal statutes are to be so construed

[8] It cannot possibly be contended that the property interest of appellants is as slight ("the opportunity to work at one isolated and specific military installation") or the government interest as substantial and unique ("as proprietor, to manage the internal operation of an important federal military establishment") as those were characterized in *Cafeteria Workers*. 367 U.S. at 896.

as to avoid serious doubt of their constitutionality. That general principle has been applied with particular vigor where the constitutional claim is the right to procedural due process. As was said in *Greene* v. *McElroy*, 360 U.S. 474:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See e.g., *The Japanese Immigrant Case (Kaoru Yamataya* v. *Fisher)*, 189 U.S. 86, 101, *Dismuke* v. *United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 107-108; *Hannegan* v. *Esquire*, 327 U.S. 146, 156; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337; *United States* v. *Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." 360 U.S. at 507-508.

Greene and its antecedents are particularly compelling here:

> "We are after all dealing with a subject, unemployment compensation, in which the opportunity for hearing was considered by Congress to be so fundamental that it was expressly mandated on the State agencies that they provide 'opportunity for a fair hearing, before an impartial tribunal' for all individuals whose claims are denied. See 42 U.S.C. § 503(a)(3)." *Smith, supra*, 435 F.2d at 437-438.

CONCLUSION

The judgment of the three-judge court below should be reversed, and a judgment should be entered construing 42 U.S.C. § 503(a)(1) & (3) and 5 U.S.C. §§ 8501-8508 to require an opportunity for a fair hearing for purposes of unemployment compensation for all former federal probationary employees who did not resign, or a judgment should be entered holding 5 U.S.C. § 8506(a), as interpreted by the appellees, to be unconstitutional.

Respectfully submitted,

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June 14, 1973